

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BS&B SAFETY SYSTEMS, L.L.C.
Respondent

and

Case 14-CA-239530

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC**
Charging Party

Rebecca Proctor, Esq.,
Counsel for the General Counsel

Sasha Shapiro, Esq.,
Counsel for Charging Party

R. Mark Solano, Esq. and Kevin Y. Litz, Esq.,
Counsel for Respondent

DECISION

STATEMENT OF THE CASE

Sharon Levinson Steckler, Administrative Law Judge. Charge 14-CA-239530 was filed by Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (the Union) against Respondent BS&B Safety Systems, L.L.C. (Respondent) on April 15, 2019. On May 23, 2019 the Union filed the first amended charge against Respondent. General Counsel issued a Complaint in charge 14-CA-239530 on May 30, 2019. The Complaint alleges that Respondent violated Section 8(a)(3) and (4) by terminating its employee and local union president Michael Stroup. Although Respondent admits it terminated Stroup, it maintains it had legitimate business reasons for doing so. I find Respondent violated the Act as alleged.

A trial was conducted on August 27 and 28, 2019 in Tulsa, Oklahoma. Counsel for the General Counsel¹ and the Respondent filed post-trial briefs in support of their positions, which I have carefully considered. On the entire record, I make the following findings of fact, conclusions of law, and recommendations.

¹ The Union filed a post-hearing brief in which it adopted General Counsel's brief and requested an additional remedy.

FINDINGS OF FACT²

I. JURISDICTION AND UNION STATUS

5 Respondent admits it is a Delaware limited liability company with an office and
manufacturing facility in Tulsa, Oklahoma (Respondent's facility) and is engaged in the
manufacture and non-retail sale of pressure relief devices. In conducting its operations during
the 12-month period ending May 31, 2019, Respondent admits it sold and shipped from its Tulsa,
10 Oklahoma facility goods valued in excess of \$50,000 directly to points outside the State of
Oklahoma and purchased and received goods valued in excess of \$50,000 directly from points
outside the State of Oklahoma. Respondent admits and I find that it is an employer engaged in
commerce within the meaning of Section 2(2)(6) and (7) of the Act.

15 I also find that the Union and the Union's servicing agent, Local 4992 (Local 4992), are
labor organizations within the meaning of Section 2(5) of the Act.

II. RESPONDENT'S OPERATIONS

20 Respondent manufactures pressure relief devices that are used in military and non-military
applications. (Tr. 377.) Respondent has two production units within its Tulsa facility: RPP and
Custom Engineer Products (CEP). It also packages and ships the finished products to its
customers.

25 Dr. Charles Hart is the corporate director of human resources, employee health and
safety, and NAFTA. Respondent has employed him for over 11 years with general oversight for
Respondent's human resources and occupational safety and health in Canada, the United States

² Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 n. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 n. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

and Mexico. He also is responsible for real property and insurance liability. He sits on safety committees and develops training programs. He also is the contact person for labor relations. Hart has labor relations responsibilities at Respondent's Tulsa facility, which is the only unionized facility of the 8 for which he has responsibilities. (Tr. 405-407.) One HR specialist reports to Hart. (Tr. 408-409.) Only Hart has the authority to approve or authorize discipline. (Tr. 409, 426.)

Production Manager Allan Roberts³ supervises Tim Jones, who supervised alleged discriminatee Michael Stroup. Roberts reports to Operations Manager Dennis Amend.

The engineering manager currently is Danny Hamra. He was not acting manager or manager during the events in March 2019. His degree is in mechanical engineering. He worked as a design engineer, then senior design engineer and then assistant engineering manager. (Tr. 294, 376.)

Respondent maintains a Quality Policy, which is not related to any disciplinary policy. The current manager of the Quality Control department is Lori Sook.⁴ Sook oversees the work of 2 quality engineers and 3 quality inspectors in her department. The work involves inspecting products created in the manufacturing process and in final inspection before the products are shipping to the customers. She also ensures that quality systems certifications are maintained. (Tr. 270-271, 368.) Sook reports to the vice-president of quality, Dr. Joseph Izzo.

III. LOCAL 4992'S ACTIVITIES AND STROUP'S ROLE

Respondent and Local 4992 had a collective-bargaining agreement, which was effective from August 7, 2014 through August 6, 2017. (GC Exh. 2.)

Chad Vincent was the Union's staff representative to Local 4992. Vincent was responsible for a number of bargaining units, including Local 4992, from June 2014 through June 2019. Vincent stated relationship with Respondent declined because Respondent was less willing to work with the Union and because Respondent hired a new production manager.

Local 4992 President Michael Stroup was a grade 9 fabricator until his termination on April 9, 2019. In his role as president, Stroup was responsible for the day-to-day operations of the local, including grievance writing and meetings and sending emails to Respondent. He also sat in disciplinary hearings and made information requests. He kept the membership up to date on policies from Respondent and information from the Union and Local 4992. He interacted with supervisor's daily. He interacted with Roberts at least once a month and at various time with Dr. Hart. When he met with Hart, Hart usually took notes, but other managers did not always take notes. (Tr. 128-129; GC Exh. 22.) Stroup assisted Vincent in handling relationship with Respondent and communicated with Vincent about what needed to be done. (Tr. 34.)

Matt McAfee, another employee in the same classification as Stroup, also serves on the negotiating committee. McAfee was a past president but served for only 6 months many years before the events here.

³ Roberts has been with Respondent for 50 years, of which 39 years have been as production manager. (Tr. 397.)

⁴ Sook worked for Respondent for 5 years. Her previous employment included jobs quality control and quality engineer, although she does not have an engineering degree. (Tr. 374.)

When the collective-bargaining agreement expired in 2017, Vincent, Stroup and two additional employees served on the bargaining committee. The collective-bargaining agreement was extended twice, but since November 30, 2017 the employees have worked under the terms of the expired contract. (Tr. 35.) In response to the contract expiration in fall 2017, the union began encouraging organizing t-shirt days for union shirts. (Tr. 69.)

IV. IN 2018, UNION ACTIVITIES LEAD TO RESPONDENT'S ANTI-UNION ACTIVITIES AND UNFAIR LABOR PRACTICE CHARGES

Beginning in January 2018, Stroup coordinated activities with the bargaining unit employees. These activities included: putting stickers on personal belongings; and in late January to the beginning of February 2018, in Respondent's front parking lot, parking cars to face the street with "Fair Contract Now" posters. (Tr. 36, 69.) Similarly, a committee member's wife administered a Facebook page, with pictures of employees. (Tr. 78.)

After the employees parked their cars in the front lot with the signs in the last week of January and beginning of February 2018, Stroup's supervisor called Stroup into a meeting in Manager Roberts' office. Stroup faced Plant Manager Roberts, Dr. Hart, and Operations Manager Amend. Stroup asked Hart what the problem was. Hart said Amend wanted to tell him something. Amend then stated when "they" drove to work that morning, they noticed a bunch of cars, more cars than usually parked out front and asked Stroup to tell the members to move their cars to the back lot. (Tr. 138.)

Respondent then issued memos to employees, on February 1 and 2 respectively, to park only in the back of the facility and would not allow employees to enter the facility through certain doors. Both memos, written by Dr. Hart, threatened disciplinary action for failure to comply. (Tr. 69-70; GC Exhs. 18-19.)⁵ Respondent asked McAfee if the building access was limited due to concerns originating in the safety committee, and he was unaware of it. (Tr. 109.)

Respondent contended that, in 2018, the Union started badgering it with unfair labor practice charges. On February 13, 2018, the Union filed unfair labor charges against Respondent. (GC Exh. 6.) Before 2018, the Union had filed only one unfair labor practice within approximately 50 years.

In February 2018, Respondent also changed its past practice on the number of persons who were allowed to take vacation at any given time. (Tr. 37, 74-75.) Before February 2018, 3 labor grade 9 fabricators were permitted to take off any given day or week, which was reduced to permit only 1 grade 9 taking vacation each week. (Tr. 75.-76) The change meant that, even if only one person to take off any given day, no other person could take off any other day of the week, much less the entire week for vacation. Persons with seniority could not take all their available vacation.⁶ (Tr. 76.) During this time, Stroup made contacts weekly with his direct supervisor and monthly with higher level manager about the vacation scheduling problems. (Tr. 148.) On July 20, 2018, the Union filed another unfair labor practice charge that included

⁵ Respondent also cut the time in which employees could access the shift, from one hour before shift to 10 minutes. Employees used the early time to gather and discuss personal, work and union issues. (Tr. 73-74.)

⁶ Employees could be paid for the remaining vacation.

allegations about Respondent violating Section 8(a)(3) by changing its vacation scheduling practices in retaliation for union activities. (GC Exh. 6.)

Stroup also noted that Respondent increased disciplinary actions against bargaining unit employees during 2018. Vincent, during his time as staff representative for Local 4992, noted that before 2018, he only had one step 3 disciplinary (non-attendance related) before 2018. Vincent noted that not all disciplines were reaching step 3 level, but Stroup and Vincent frequently were discussing employees who were written up. Stroup filed a number of grievances. (Tr. 38.)

On June 8, 2018 Stroup met with Dr. Hart about Respondent's increased disciplinary actions to bargaining unit employees. (Tr. 141; GC Exh. 17.) Stroup cited examples of discipline and issues with Amend and Roberts. Stroup also asked whether Respondent was using the recently installed close-circuit cameras for disciplinary purposes. (GC Exh. 17, p. 3.) Stroup reported nothing about disciplinary action changed after the meeting.

Informational pickets began every day at lunch and after the shift, which was covered a few times by the local news media. (Tr. 77.) During summer of 2018 Local 4992 also leased a large billboard across the street from Respondent's facility: "Missing fair contract" pointed an arrow towards Respondent's facility and directed readers to the group's Facebook page for more information. (Tr. 78.) The news media interviewed Stroup, McAfee and Vincent and Shelly Brazille. (Tr. 79.) While the interviews took place, managers left through Respondent's facility's front door. Some media members attempted to access the facility. (Tr. 79.) Stroup found that during the picketing, managers distanced themselves from the employees in the bargaining unit. (Tr. 201.)

Ian Slattery, Stroup's supervisor at the time, asked Stroup a few times about how long the picketing would continue and why it was taking place. Stroup explained it was a show of solidarity during the labor dispute and that the employees were attempting to get a contract. (Tr. 202.)

In August 2018, the parties resumed contract negotiations. McAfee raised problems with overtime and Manager Amend, then stated that perhaps Local 4992 should discuss a possible strike vote at the upcoming union meeting. (Tr. 80.) McAfee noted that Production Manager Roberts, red-faced, was staring angrily at him after he raised Amend as a problem. (Tr. 79-80.)

McAfee, who used the breakroom at least once or twice per day, left a clipboard, paper, and colored markers in the breakroom for employees to use to make signs. The employee and the sign would then be photographed. One sign said, "No contract, no peace" and another said, "#firedennis" [sic, Dennis Amend]. (Tr. 81.-82.) The Union also posted bargaining updates in the breakroom. On August 14, about a week after negotiations, McAfee found that the sign materials and posting were missing from the breakroom. Later that day, Respondent issued discipline to the 3 employees serving on the bargaining committee: Stroup, McAfee, and Miller. (Tr. 82, 143.) McAfee's supervisor escorted him, with Stroup as his union representative, though the plant to a conference room to which employees do not have access. (Tr. 83-84.) On August 21, 2018, the Union filed an additional unfair labor practice charges regarding the removal of items from the breakroom and the disciplinary actions. (Tr. 84-85; GC Exh. 6, p. 5.)

General Counsel issued complaint regarding a number of the allegations contained in the three charges.

V. ULP HEARING IN OCTOBER 2018 AND SETTLEMENT DISAGREEMENTS

On September 17, 2018, General Counsel issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on the above charges. The Consolidated Complaint alleged Respondent violated Section 8(a)(1) by Production Manager Roberts removing union literature and other union materials from the employee break room and that Dr. Hart told employees he ordered the removal of union communications and other union materials from the break room. The Consolidated Complaint further alleged Respondent violated Section 8(a)(3) and(1) by implementing its new parking requirements and not allowing employees into the facility until 10 minutes before shift. Other 8(a)(3) violations included closer monitoring of Stroup, McAfee and Miller and the August 14 discipline of the same employees, all members of the Union's negotiating team. The Complaint also alleged the changes in parking rules, access and vacation as unilateral changes.⁷ (GC Exh. 7.) Respondent's answer denied all wrongdoing.

The parties prepared for hearing. General Counsel issued Stroup a subpoena, which Stroup gave to Roberts. (Tr. 143.) In October 2018, the parties convened before an NLRB administrative law judge, who apparently required the parties and General Counsel to settlement. (Tr. 41.) Stroup appeared at hearing but did not testify. He worked with the Union team towards settlement. Present for Respondent at the hearing were Dr. Hart, Dennis Amend, Jason Evans, Lori Sook and Tim Jones, who saw Stroup at the hearing. (Tr. 197.)⁸

The parties entered into an informal Board settlement that provided: Respondent would not remove union information and materials from the break room or tell employees that Respondent ordered the removal of Union information and materials from the break room, and rescind such policies; Respondent would not monitor work and adherence nor discipline employees because of the union membership or support; Respondent would not implement restricted parking area and restricted access policies because of employees' union membership or support and rescind such policies; Respondent would not unilaterally change the number of employees allowed to take vacation at one time without bargaining with the Union; and, Respondent was required to remove from their files the warnings issued to Stroup and two other employees on August 14, 2018.⁹ Issues included that the Union agreed to limit employee parking to six front parking spaces. (Tr. 41.) The settlement included a non-admissions clause for Respondent. (GC Exh. 9.)

Throughout 2018, Local 4992 filed 23 grievances, but none between late November 2018 and March 2019.

VI. LOCAL 4992 PRESIDENT STROUP REMAINS INVOLVED IN POST-SETTLEMENT ACTIVITIES

Vincent instructed Stroup to monitor the settlement for compliance. Despite the language of the settlement agreement, Respondent apparently had difficulties complying with several aspects of the settlement, or as Vincent stated, "The settlement agreement that we believed we entered into that day at hearing was not being followed by the company the way that we

⁷ General Counsel alleged two additional unilateral changes about a new documentation requirement in the shipping department and a new stock room procedure. (GC Exh. 7.)

⁸ None of Respondent's witnesses denied seeing Stroup at the hearing.

⁹ The settlement addressed the additional alleged Section 8(a)(5) unilateral changes. (GC Exh. 9.)

understood and the way that it was read.” (Tr. 42.) Respondent changed the access codes for the identification badges to enter the doors as before, but the inside of the doors at issue remained labeled with “exit only” signs. Stroup talked to Dr. Hart about that problem.

- 5 The Union believed the biggest stumbling block post-settlement was the vacation issue. In the settlement addendum Respondent agreed to specific language on the vacation policies:

10 Respondent agrees to return to its prior practice of allowing three Labor Grade 9 Fabricators to simultaneously utilize vacation time on any given day and of allowing three Labor Grade 9 Fabricators to “lock in” vacation for any given work week during the February “lock in” period. Should backlogs and past-dues require a reduction in the number of Labor Grade 9 Fabricators allowed to utilize vacation time on any given day Respondent will provide Charging Party thirty-day notice of the reduction, accompanied by documentation of the backlogs and past-dues.
15 Such reductions may not last more than sixty days without additional timely notice and documentation of past-dues/backlogs being provided to the Charging Party. Respondent agrees that even if such notice is provided, it will not cancel or in any other way impact locked in vacation time.

20 Respondent agrees to work with Charging Party to identify any bargaining unit employees who between February 2018 and the present requested vacation time, were denied vacation due to one other Labor Grade 9 Fabricator being on vacation, and who received attendance points or attendance-related discipline due to the denial. Once such employees are identified, Respondent agrees to rescind
25 any attendance points and/or attendance discipline resulting from the denial.

(GC Exh. 9, p. 6.)

30 Stroup followed up with Respondent to obtain the documents, compare them and ensure that they were accurate and then present the information to the bargaining unit. (Tr. 144.) The Union attempted to enforce the vacation provision of the settlement, permitting more than one person to take vacation. In mid-December 2018, Respondent and the Union met with the Regional office by phone to attempt to resolve the matters. Part of the “resettlement” was that Respondent would be required to provide information to Stroup and Vincent. (Tr. 63; GC Exh.
35 10.) Despite the call, the Union continued to have difficulty enforcing the settlement language on vacation. (Tr. 85-86.)¹⁰

40 Respondent provided some of the requested information requested. (Tr. 45.) The vacation issue was critical in December and early January because in February employees bid on vacations. When employees bid on their vacations, the ones with the most seniority and most vacation time would attempt to “lock in” their vacation times. (Tr. 43.) Despite Respondent’s agreement in the settlement, Respondent failed to change the policy back. Stroup was in touch with many of the employees about the provision. He had a number of contacts with Respondent about the issue, stepping up his contact in January and February 2019 to weekly because of the

¹⁰ Stroup did not know when he filed his last grievance because he did not have his records. (Tr. 191-192.)

upcoming “lock in” period. (Tr. 88, 149.)¹¹ Respondent would hear from Stroup about information on the vacation restrictions, schedule attainments and “past dues.” In February 2019, he specifically discussed schedule attainment with Roberts and attempted to make headway on the vacation issue. (Tr. 205.)

On March 4, 2019, Stroup emailed Dr. Hart, Managers Amend and Roberts, and Respondent’s counsel about the vacation issues:

I was wondering, has there been any conversation as to what a threshold would be to allow more than one person off or are we going to continue down this path with zero solutions & hope it solves itself??

Why is overtime not being offered past 5:00 p.m.?? Why aren’t the last & first Saturdays of the month being offered?

There are some things that could be done to move the needle where vacations & limitations are concerned.

(GC Exh. 24a.)

On March 29, 2019, Stroup emailed the same managers and Respondent’s counsel with a reminder that Hart was supposed to take care of the matter in January and April was almost upon them. (GC Exh. 23.) On April 1, 2019, at 11:40 a.m., Stroup again emailed Respondent’s managers and counsel with the same questions as in the March 4 email but added, “Kicking the can down the road is lazy management & does not address anything.” (GC Exh. 24b.)

Per Roberts’ notes dated and timed as April 1 2:40 p.m., Dr. Hart, with Roberts present, suspended Stroup pending investigation for a production error he made on March 14, 2019 (about 2 ½ weeks before his notification). (Tr. 150.) Respondent terminated Stroup on April 9, 2019.

VII. RESPONDENT SUSPENDS, THEN TERMINATES STROUP

Stroup, an employee known to all the managers as the Local 4992 president, admittedly made a production error. Respondent suspended and then terminated Stroup respectively on April 1, 2019 and April 9, 2019.¹²

A. *Stroup, the Work in CEP, and Internal Review Reports*

All managers and supervisors knew Stroup was president of Local 4992. Stroup worked in the customer engineered product section (CEP) as a labor fabricator grade 9 since about December 2018 or January 2019. He briefly worked in CEP when he was initially hired in June 2014. Respondent provided no formal training and the only training he received was on the job

¹¹ The Union continues to have difficulties enforcing the settlement on vacation after Stroup’s termination. The Union filed a grievance, signed by 16 of the 30 bargaining-unit employees, which Respondent received on June 26, 2019. (Tr. 116-117; GC Exh. 21.) None of these employees received discipline. (Tr. 118.)

¹² All dates in this section, unless otherwise stated, occurred in 2019.

from the other operator in the area. (Tr. 152, 212, 362.) In the five-year period before Stroup returned to CEP, the number of staff working in CEP decreased from 4 to 5 employees to 1 to 2. (Tr. 209.) Stroup was the second person, but the production requirements, including time to complete tasks, had not changed in the last 5 years. (Tr. 151, 209.) Before the incident leading to Stroup's suspension and termination, he only incurred about 10 IRRs, for which he received no discipline. (Tr. 165-166.)

Matthew Kilgore, who worked in CEP for 3 ½ years, testified that the different customers required different operations, causing need for time to become proficient. (Tr. 208.) Tasks in CEP varied from product to product. Kilgore stated CEP always ran a backlog due to changes Respondent made in how certain products were prioritized. Respondent added additional duties, such as cleaning in the oxygen clean room, that were previously handled by Quality Control staff. If the oxygen clean room must be serviced, the supervisor interrupts the CEP operator to do that task, even if the CEP operator is in middle of an order. (Tr. 210-211, 212.)

Kilgore and Stroup both testified that they had frequent interruptions during the workday. Kilgore testified, in more detail, that the interruptions sometimes depended on the day of the week but could be as frequent as a couple of times per hour. (Tr. 213.) Interruption arose from updates throughout the day from one's supervisor about varying workplace issues. (Tr. 97.) Based upon these interruptions, McAfee stated it was possible for an employee to miss a production step. (Tr. 97.)¹³

For parts made in CEP, the fabricator receives a lot card and a drawing for the assembly, and sometimes a "traveler" showing the steps for assembly. (Tr. 381-383.) Each part in CEP has at least 4 to 6 steps to completion, and for Stroup usually 8 to 12 steps at the time of his termination. (Tr. 152-153.) Most of the products that Stroup constructed took 2 ½ to 3 days to complete. Stroup then followed standard procedures by putting the completed order on a shelf at Quality Control (QC) and notified QC that the order was ready for testing and certification. (Tr. 153-154.) Kilgore testified that it was not unusual to have CEP errors. (Tr. 213.)

When errors are detected, about 25 to 50% are reported on Internal Review Reports (IRRs). (Tr. 90-91, 251.)¹⁴ IRRs are formal forms Respondent uses to identify and correct production errors. Respondent has no consistent system for determining when IRRs are needed and only determines when to use the IRRs on a case-by-case basis. (Tr. 90-91.) Quality Control cannot initiate IRRs for non-conforming parts without Supervisor Sook's permission. (Tr. 248, 300, 373.)

Engineering reviews IRRs. Hamra estimates he sees 10 errors from CEP per month that are documented on IRRs and more if including small mistakes not covered by IRRs. (Tr. 300.) Amend testified that he does not "systematically" review IRRs. (Tr. 344.)

¹³ LeGrand did not corroborate the others on the frequency of interruptions. (Tr. 226.)

¹⁴ Based upon his experience with grievance and employee representation, McAfee testified the most frequent disciplinary causes were shipping-related, such as packaging errors. (Tr. 91-92.) McAfee estimated, based upon his experience and knowledge of other employees, that Respondent only compiles IRRs in less than 25% of the production errors, which rarely lead to discipline. (Tr. 91.)

Each form identifies the types of parts and job numbers as well as engineering's review and disposition. The disposition could be reworking the parts or turning the parts into scrap. When products should be reworked, the fabricator usually receives the product on the same day in order to get the product to the customer as soon as possible. (Tr. 252.)

5 B. *Respondent Suspend Stroup for a Production Error*

10 Stroup was out of the facility when, on March 18, the first CEP operator notified him that he made an error on assembling pieces. Stroup returned to work on March 20, 5 working days after he assembled the parts. (Tr. 154-155.) The error was leaving out a disks in 77 parts, which was the number of completed parts in a single box. (Tr. 389.)¹⁵ Stroup could not recall how he made the error but opined he could have had a work distraction. (Tr. 180.) He apparently was not advised of any other problems. For this particular customer, Quality Control checks 100% of the parts, so these parts would not have reached the customer. (Tr. 223, 266.)

15 On March 19, Tim Jones, Stroup's production supervisor, discovered that 77 pieces assembled by Stroup lacked rupture disks. When Stroup returned from his time off, he saw that the box was located on the Quality Control shelf. He checked with Jones and requested to fix the parts. Jones asked Quality Manager Sook whether the parts could be reworked. (Tr. 155, 357.)
20 Stroup received the parts for rework. (Tr. 309, 357; GC Exh. 27, p. 4.) He then opened each part and rechecked that he left out the disk. Before the first break, Stroup was ready to insert the disks, as he would for any similar rework order. (Tr. 155.) The entire process to rework the 77 parts, with inserting the disks, would have taken approximately 2 hours. (Tr. 267.)¹⁶

25 However, when Stroup returned from first break to his station, the parts were not at his station. Stroup asked Jones where the parts were. Jones told him that, at the 9:00 a.m. managers meeting, Roberts told him to move the order to the supervisor's office and keep the order quarantined. (Tr. 156, 309, 358-359; GC Exh. 27, p. 4.) Sook apparently raised the leak rate, which Amend stated was at 15%. (Tr. 344.)¹⁷ The quarantine meant Respondent was not likely
30 to allow Stroup to complete the repair on the 77 parts. (Tr. 157.) Between March 20 and April 1, Stroup asked 2 or 3 more times to be allowed to complete the rework. (Tr. 158-159.)

35 Although Jones spoke with Stroup and Kilgore about the error, neither Jones nor Kilgore were asked to give a statement. (Tr. 358-359.) On March 21, Sook sent to Hamra, Robert Amend and Supervisors Slattery and Jones a copy of an IRR, stating she needed a disposition from Engineering. She also identified that 510 parts were sampled instead of 500. The reasons stated on the IRR for rejection were: 77 parts without disk inside; disk not seated correctly quantity to

¹⁵ If looking through the completed part with a flashlight, one can see with the naked eye whether the disk is present. (Tr. 181.) However, Farris testified the appropriate way to determine whether this part is correctly made is by placing it in a pitcher and then adding pressure. If no disk is present, bubbles escape from the part. (Tr. 264.)

¹⁶ Hamra testified the process would have required 6 hours. However, I did not ask him why 6 hours. (Tr. 301.)

¹⁷ Amend denied that Sook told him who the operator was or that he knew who the operator was. Considering that the documentation has the operator number and that only 2 employees worked in CEP at the time, I find it likely Amend knew that Stroup was the operator. Amend also testified that he found out about the error on March 19, but nothing in Sook's notes reflects communication with amend on March 19. (Tr.344-345; GC Exh. 27, page 8.)

be determined, at least 1; and a total 44 parts with illegible markings, 29 of those with ghosting markings. (GC Exh. 15, pages 1-2.)

5 On March 22, Hamra's IRR notes state that the 77 parts missing disks should be
disassembled and disks installed. For the disks not seated correctly, the disks should be removed
and replaced. For the 29 parts with ghosted markings, those should be scrapped, and all parts
with marking issues should be scrapped. (GC Exh. 15, page 3.) Thus, out of an order of 510
parts, Hamra recommended, and Sook agreed, only 29 were scrapped: The 77 parts missing the
10 disks could be reworked. (Tr. 284; GC Exh. 15, p. 3.)¹⁸ Hamra testified that some parts had to
be disassembled to confirm that which components were missing. Roberts admitted that the disk
errors should be caught in Quality Control.

15 The parts at issue remained on a chrome rack outside the inspection area. McAfee asked
quality control inspector Tony Cinelli whether the parts could be moved to make room for
additional parts. Cinelli told him the parts were related to a developing internal review report
(IRR), but could be moved. Cinelli also stated that "there had been an attempt to return them to
the shop floor for rework, but ultimately Lori Sook, the QC manager, had requested that another
inspector write an IRR on it." Neither Sook nor any other manager took a written statement from
Cinelli. (Tr. 372.) Despite Cinelli's representation, the parts remained on the rack. (Tr. 89-90.)
20

On Friday afternoon, March 29, Dr. Hart began the "formal investigation" of Stroup. (Tr.
20, 275.)¹⁹ The face-to-face meeting included Amend, Roberts and Sook. Hart testified that he
normally does not review production errors and associated discipline based upon internal review
reports. (Tr. 24.) However, to the contrary, Amend testified that neither he nor Roberts can
25 discipline with approval from the human resources department. (Tr. 332.)²⁰ Dr. Hart, after starting
the meeting, called Engineer Hamra into the meeting. (Tr. 315.) Amend stated once Hamra was
in the meeting, the managers did not discuss Hamra's determination that the parts could be
reworked: Yet Amend testified that they heard from Hamra a "technical perspective with the lot
and if he knew how it occurred and what happened there." (Tr. 334-335.) According to Amend,
30 the product did not meet the customer expectation as per the quality policy. (Tr. 352.) Nor did
the managers discussing revising the IRR. (Tr. 422.) The managers determined they needed a
more formal statement from Stroup. (Tr. 351.) Hart could not recall anyone taking notes. (Tr.
422.)

35 When Respondent discussed the problems with additional parts with Stroup beyond the
disks, it did not show the parts to Stroup and he could not verify the errors. (Tr. 174.)

¹⁸ Roberts' notes indicate the decision to quarantine was made on March 21, with the investigation beginning on March 20. These notes are in conflict with the IRR signed by Sook and Hamra on March 22 that allowed rework.

¹⁹ Amend testified that the meeting was delayed due to personal availability, with different managers and Hamra out of town at different times and "typically we like to do our business face-to-face." (Tr. 338-339.) Hart was in Ireland at corporate headquarters when the matter arose. However, testimony throughout the hearing showed that the managers emailed each other later in the investigation and, when Respondent allegedly determined to terminate Stroup, the determination was made by teleconference.

²⁰ On day 2 of the hearing, Hart testified about his role in discipline on direct examination for Respondent in agreement with Amend and Roberts. On day 1, he gave the answer about not usually being involved with production errors. He gave no explanation for the change. The only reasonable explanation is that Hart does not see most production errors.

On Monday April 1, Respondent suspended Stroup.²¹ Stroup and his union representative, quality inspector Billy Farris, attended a meeting with Dr. Hart, Roberts and supervisor Ian Slattery. (Tr. 159.) Stroup gave his statement, then Farris argued about the IRRs. Farris had reviewed the IRR log and found 5 similar issues on the IRRs. Farris brought to the meeting the 5 IRRs and pointed out none of the 5 received discipline. (Tr. 254-255.) Dr. Hart said they were not present to discuss other cases. Stroup told him not to worry about it. (Tr. 160.) Stroup testified that when he was interviewed for the investigation, the tone of the interview was more accusatory than other investigatory meetings he attended for other employees. (Tr. 189-190.) Jones, Stroup's supervisor, had not ever seen an employee suspended for an error during his 1-½ years with Respondent. (Tr. 360-361.)

C. After It Suspends Stroup, Respondent Continues Its Investigation and Edits Reports

Roberts' notes, which were written by Dr. Hart after Roberts provided a summary, convey that Roberts interviewed Tim Jones on April 3 at 8:34 a.m. (Tr. 313.) Although Roberts cites that 122 parts failed the quality testing in the 500-piece order, Roberts apparently only discussed the 77 parts that missed disks. Jones told him that when he asked Sook whether the parts could be returned to production, she affirmatively agreed. Regarding the meetings leading up to Stroup's termination, Roberts could not recall how many meetings he attended, nor did he see any notes from meetings others attended, plus he had phone calls without notes. (Tr. 314.)

Sook submitted a report, dated April 3. (GC Exh. 27, pages 8-9.) However, I do not credit her entire report as it omits the initial assessment from Hamra, before April 5, determined that the parts should be repaired instead of scrapped. She admittedly discussed an alleged part failure repeatedly with Amend, but eventually stated this issue would need to be discussed "more thoroughly with Engineering." She also omits that she at first agreed to permit the parts to be corrected and that only after the management meeting was she instructed to quarantine the 77 parts. Sook never recommended disciplinary action for any previous CEP errors, except related to one alleged discriminatee in the earlier unfair labor practice case. (Tr. 279-280.)

On April 5, Danny Hamra, Respondent's chief engineer, reported, by email to Hart, his investigation into the errors. Hamra identified that each box would have 77 items in it, and the error was likely to have taken place for a box being out of order or somehow the step of putting in part was skipped. Hamra included in his summary that Stroup told him it was likely that he was pulled away from this project and he re-started at an incorrect point. Other parts were rebuilt with replacement disks and Hamra opined that those parts should be "defect free." (Id.) Hamra found Stroup had no malicious intent. (GC Exh. 29, pages. 4-5.)

Hamra submitted to Dr. Hart his statement about the investigation, including a statement that the parts were reworkable and that the part errors were the result of a mistake. (Tr. 297.) Hart, responding to Hamra, wrote that Hamra's report did not "meet the needs of the Formal Investigation that the Company is currently conducting." In addition to making some format changes, Hart instructed Hamra:

....

²¹ Some of Respondent's witnesses testified Stroup was not suspended on March 29 because it was a Friday, and they waited until Monday. Monday would have been April 1. Other testimony in hearing indicates that he was suspended on April 2, the day after Stroup's email.

4. The report is to contain discovery and engineering analysis of what failures occurred.

5. The report is not to contain opinions or conclusions by you. That will be the decision made by the management Team and legal at the conclusion of the Investigation prior to meeting with the LG9 and Union representation.

6. Understand that your document will become a “discoverable” document in a court of law.

....

10 (GC Exh. 29, p. 3.)

Before this time, no one had ever requested Hamra provide a formal statement about any determination he made during his employment. (Tr. 299.)

15 *D. Respondent Terminates Stroup*

By a meeting on April 8, Hart, Amend and Roberts had a teleconference in which it determined to terminate Stroup. (Tr. 328-329, 341-342.) None of the managers specifically took credit for determining that Stroup should be terminated. Amend testified that at the time of the suspension, the managers had not determined to terminate Stroup. He guessed that the determination was made about April 8. He thought the “magnitude” of the error and “just the circumstances around it” led to the termination determination. (Tr. 339.) Roberts testified that the error was severe, but on cross-examination admitted that the product missing the rupture disk, if tested appropriately in Quality Control, would not pass the inspection. (Tr. 401.)²² Hart implied Amend and Roberts determined that termination was appropriate. (Tr. 424.) Again, apparently Respondent kept no documentation about this decision. (Tr. 346.)

On April 8, Respondent notified Stroup to come to Respondent’s facility the following day at 9:30 a.m. (Tr. 161.) On April 9, 2019, Dr. Hart and Manager Roberts met with Stroup and his union representatives, McAfee and Farris. McAfee took notes of the meeting.

Hart began the meeting by handing Stroup a termination letter and said the outcome of the investigation led to Respondent’s reasons for discharge. When asked what the precedent was for Stroup’s termination, Hart stated, “Gross negligence and substandard performance.” The employees asked Hart about other mistakes Stroup made and presented other IRRs and issues, including an employee (CSS) who made frequent mistakes. Stroup presented a verbal warning to Greg Putman, dated August 3, 2018, for using in the wrong disk material in making a part. (Tr. 161; GC Exh. 26, p.1.) Farris also stated there were a number of errors from a sister company, and nothing was done with that information; he also raised that union employees were treated different than those at the non-union plant. (Tr. 256.)

Hart said he was only going to talk about “this case.” Stroup pointed out that the error made by Putnam should be considered due to the serious nature and because the discipline should match the error. (Tr. 164.) Stroup raised that the precedent was his union activities. Hart

²² Roberts’s answer became circuitous on cross-examination when asked about what made this a severe error in terms of the variables and returned to his statement that the disks were missing. (Tr. 402.) I therefore do not credit his assessment.

stated, "That is not the intention of the company. We handle this on a case by case basis." Farris argued that the union members were evaluated harshly while others were not disciplined at all. Stroup added that Respondent was not consistent in how these matters were handled. Local 4992 representatives asked whether others in Stroup's area were interviewed; Hart stated that the company did not see the need" as only Stroup's employee number was on the lot card. (Tr. 95.)²³ Farris stated that Stroup's mistake was simple, a box was missed and "there is no way one would purposely attempt such a thing." Hart denied that Stroup acted on purpose. McAfee asked why Stroup was not tested for drugs or alcohol and Hart stated neither were suspected; the occurred was presumed "an accident." (Tr. 256; GC Exh. 20.) The discussion became heated and Stroup said to "let it go because they weren't listening." (Tr. 257.) During the meeting, Respondent's representatives did not mention any policies violated.

The termination letter discussed that Stroup presented 500 pieces for inspector and 122 disk assemblies were rejected. Hart's letter noted that 77 of the parts were assembled without disks. Hart further stated:

Based on these very negative results, the decision was made to investigate the sub-standard production of the [lot number]. As part of this investigation, statements were taken from you, Tim Jones (Production Supervisor), Lori Sook (QA Manager) and Danny Hamra (CEP Engineering Manager.)

BS&B customers rely on our assurances, our reputation and our ability to provide them with products that are not only products of the highest quality but given the safety sensitive nature of our products, products that are 100% functional and manufactured to the customer's exact specifications., Any failure in the fabrication/assembly process is a problem but a failure to the magnitude in this case (i.e., a 25% failure rate) is unacceptable. BS&B's primary products are rupture disks and components containing rupture disks; in this case, incredibility, you made numerous components that were missing completely the Company's primary product: rupture disks

(GC Exh. 16.)

Stroup filed with the Oklahoma Employment Security Commission for unemployment (OESC). Respondent submitted to OESC Stroup's statement, as allegedly given to Roberts but written by Hart, and a number of additional documents, all of which Respondent relied upon for terminating Stroup. (Tr. 170; GC Exh. 27.) Until Stroup requested these documents from OESC, he had not seen any of them, including the statement he made allegedly taken by Roberts but written by Hart. (Tr. 171, 322-323.) Noticeably absent were any statements from Kilgore and Farris.

²³ Stroup testified three other employees who were not interviewed but would have had additional relevant information: Matthew Kilgore, his coworker in the CEP department, who worked on a similar order at the same time and would be a subject matter expert; Tony Cinelli, in quality control, who tested the order and found the error; and Billy Farris, also in quality control, as he was present during testing of the parts. (Tr. 162, 322-323.) Kilgore also testified that, although questioned about the incident, he was never asked to give a formal statement. (Tr. 216.)

E. Post-Termination, Respondent Changes the IRR

On April 12, after Stroup's termination, Sook and Hamra completed the IRR, which now stated all 77 pieces without disks were to be scrapped. In addition, 1 piece would be scrapped for an incorrectly installed disk. An additional 44 parts also would be scrapped for various reasons, or a total of 122 parts should be scrapped. (Tr. 285; GC Exh. 27, page 5.) Nothing is mentioned that Hamra and Sook initially determined the 77 pieces could be reworked, nor that the rework was started and stopped.

In attempting to explain why the IRR was changed, Hamra weakly explained that management called him into an ongoing meeting at the end of March. He, along with Sook, Amend and Roberts verbally agreed to change the previous IRR disposition as a "group decision." (Tr. 286.) He did not document the IRR changes in the meeting and could not recall whether any other managers made notes. None of the other managers who were involved in the group decision had any engineering experience. Hamra testified regarding his initial assessment, "I would not say that I was incorrect." (Tr. 290.) Hamra also testified that he was not involved with any disciplinary determinations other than his direct reports. (Tr. 291-292.) In his engineering role (before he became a manager), no one in management outside of the engineering department ever overrode his dispositions. (Tr. 295.) The determination, Hamra claimed, was based upon customer needs and not engineering determination, as the products were still reworkable at the time he rewrote the IRR. (Tr. 296.)²⁴ Hamra documented nothing about the change in the IRR disposition until April 12, which Sook also signed. (Tr. 286-288; GC Exh. 27, page 5.)²⁵

F. Respondent Keeps the Parts for Union or ULP Issues

Despite this claimed direction to scrap the parts, including the 77 pieces missing the disks, the 77 were not discarded and remained on the rack in the Respondent's facility. They were never reworked, despite Hamra's continued belief that they could easily be repaired. Roberts testified that the due date for the product presented no problem because Respondent needed to send other parts to the same customer. (Tr. 321.)

Roberts testified the parts were retained for any potential follow-up investigation. When asked why Respondent might need a follow-up investigation, Roberts stated frankly and without any hesitation: "Well, if discipline was going to be levied or given to Mr. Stroup, generally the union would push back, file a grievance or file an unfair labor practice." (Tr. 317.)

G. Disparate Treatment Evidence

Both General Counsel and Respondent presented disparate treatment evidence.

²⁴ Hamra also testified that any repair would have put shipping to the customer only 1 day. (Tr. 301.)

²⁵ Hamra testified that he couldn't say for sure whether he amended any IRR weeks after the original disposition but testified he has revised IRRs. (Tr. 301.) Respondent provided no evidence to demonstrate that Hamra ever changed an IRR weeks after an initial disposition, so I discredit this testimony.

1. General Counsel's evidence

Production errors occur daily at the plant. (Tr. 166.) However, not all production errors result in IRRs. Kilgore testified that supervisors notified employees about simple production errors. (Tr. 217.) The IRR is a more formal procedure. However, unlike the 77 parts Respondent retained in Stroup's case, Respondent otherwise reworks or corrects the problem to the specifications to get the product to the customer. (Tr. 217.) Kilgore testified that, when determining whether to rework a production, the percentage would be 30%. (Tr. 221.)

Stroup also testified that in his role as union president and in representing other employees, he was unaware of anyone else suspended for production errors. (Tr. 160.) Except for one employee admitting to Dr. Hart that he intentionally damaged parts, Stroup never saw a discipline greater than a written warning for production errors. (Tr. 166.) For his 5 years of experience as staff representative with this bargaining unit, Vincent could not recall any other suspensions or discharges for production errors. (Tr. 44.) LeGrand, who worked for Respondent for 6 years, also could not recall anyone terminated for production quality errors. (Tr. 228.)

McAfee testified that he made several production errors each year and never received discipline for them. (Tr. 90.) McAfee has missed one part, which might cause a three- to four-part order rejection, but the parts he makes are one piece. (Tr. 107.) He stated production errors were common and had increased over the previous 4 years. (Tr. 96.) Based upon his experiences representing employees for discipline, he stated that he had seen some verbal disciplines for IRRs, and less than 10% of the time IRRs resulted in any discipline. (Tr. 91.)

Kilgore testified about two similar incident in which two different employees made similar errors by incorrectly inserted disks into about 40 or more parts, which did not seat appropriately. Quality Control located the error. In each instance, the entire order of approximately 500 parts were reassembled and no one received discipline. (Tr. 214-215.) Kilgore stated that these errors were worse than leaving out the disks, because the quality control testing may have cleared a sufficient number that could have permitted the products to be sent to the customer. (Tr. 218.) Jones testified that Genevieve LeGrand misaligned disks and an entire lot was scrapped and rebuilt; LeGrand received no discipline. (Tr. 216, 226-228, 363.)

Farris testified that, as a quality inspector, he saw at least 3 production errors caught by inspection and those were worse than Stroup's error. None of those errors caused Respondent to discharge the employee involved. (Tr. 253.)

Farris reviewed a 21-page table of IRRs from January 2018 through July 26, 2019. The list of IRRs covered RDD and CEP, without including shipping errors. Farris testified that only 50% of errors were documents on IRRs, so half of the errors were documented. Farris also testified that, since Stroup's termination, he observed 2 or 3 errors more significant than

Stroup's. He twice observed that disks were inserted inappropriately, which caused the parts to burst and require rework.²⁶ No one was terminated. (Tr. 258.)

In the first incident, he witnessed an employee, frustrated by repeated return on parts, throw the parts on the floor and "stomp on them."²⁷ Farris reported to Supervisor Sook about the incident, which was corroborated by 6 additional employees. Sook investigated. (Tr. 259-260, 262-263.) Despite the stomping the employee finally reworked the parts in approximately 2 hours and an engineer signed off. (Tr. 267.) Respondent presented no evidence that this person was disciplined.²⁸

In the second instance, 500 parts did not withstand pressure testing in quality control. Additionally, Quality Control caught two situations in which the parts were randomly tested and found several with the disks improperly seated. The entire batch had to be tested because of the initial random testing revealing the problem. The parts with the incorrectly installed disks were reworked. (Tr. 261-262.)

As above, Amend testified that Stroup was suspended pending investigation because he did not build a product that met the customer's expectation. Excluding shipping, in his 5 years, Amend thought "maybe one or two. Not that many" were suspended pending investigation for quality.

Hart was aware of one employee, Greg Putnam, who received a verbal warning for making 13 parts from incorrect material. (Tr. 24.) Hart admitted that this error was "catastrophic" and Roberts said it had "severe consequences." (Tr. 27, 312.)²⁹ The employee also installed the erroneously built parts into another part. (Tr. 26-27.) The employee received a verbal warning for substandard performance and policy/procedure violation on August 3, 2018. (GC Exh. 26.) This employee was raised when Respondent terminated Stroup. (Tr. 163.) Hart did not want to look at other employees. Hart, Amend and Roberts determined the appropriate level of discipline was a verbal warning for Putnam. (Tr. 312, 341-342.)

2. Respondent's evidence

Respondent maintains that no one ever forgot to insert disks in a product. It also contends that it terminated five employees for actions similar to Stroup's. Dr. Hart admitted that 3 were terminated for purposeful errors and 2 for failing drug tests. (Tr. 427-428.)

For Employee One, Respondent's letter, dated October 21, 2013, identified the following issues leading to termination of a quality inspector:

²⁶ Farris also observed that a cleaning crew knocked 42 parts off a table. The parts landed on the floor and were permanently damaged. Those parts were not reworkable and were destroyed, putting the order behind. (Tr. 257-258.)

²⁷ "Stomp," when used as a verb, means to walk with a loud heavy step usually in anger; not to be confused with the noun version as a jazz dance. See www.merriam-webster.com/dictionary/stomp.

²⁸ Respondent did not ask Sook about this report, so I must conclude that it was accurate and Sook did not proceed with any discipline after her investigation. See *LSF Transport*, *supra*.

²⁹ Roberts attempted to avoid the question; General Counsel pointed him to his affidavit. (Tr. 312.)

You have manually lined through correct calibration noted by [the] Quality Manager and substituted you calibration, which was incorrect. You substituted the old incorrect calibration despite specific written and verbal instruction from [the] Quality Manager to you and your team members regarding the importance of calibrating the entire range of our gauges.

On multiple occasions, you have signed off on receipts with incorrect or incomplete entries.

On multiple occasions, with inspections backlogged, you have been observed playing games on your mobile phone in your work area.

These ongoing failure are against a background of a "Last Chance Agreement" that you signed in April of this year regarding your falsification of Company documents and your misrepresentation regarding the inspector (or not) of Company products.

Hart continued: "Recently your actions have damaged the Company's reputation with a significant customer and contributed to the Company's need to re-work a part at a cost in excess of \$10,000." (R. Exh. 2)

Dr. Hart's termination letter for Employee Two, dated April 23, 2014, stated that a customer notified Respondent of a product failure, which resulted in the customer returning 12 parts to Respondent. Some of the parts were already installed in the customer's assemblies, which required removal from the assemblies. Preliminary testing revealed that the parts, both installed and uninstalled, failed leak testing. In the following month, the customer returned 224 parts that had a failure rate of approximately 25%. Employee Two, a quality inspector, was terminated 13 days after the second batch of parts was returned. (R. Exh. 3.)

On June 26, 2014, by letter from Dr. Hart, Respondent terminated Employee Three. Hart's letter stated Employee Three intentionally produced bad products and attempted to sabotage the quality assurance process. (Tr. 416-417; R. Exh. 4.)

On July 18, 2016, Respondent terminated Employees Four and Five after both failed drug tests. Respondent terminated pursuant to provisions in the collective-bargaining agreement. (R. Exhs. 5-6.) Employee Five as a labor grade 9 who served as a union official. (Tr. 419.)

VIII. ANALYSIS

The analysis here discusses witness credibility, applicable law for Section 8(a)(3) and (4) discharge cases, the parties' respective positions, and makes determinations on those allegations. It also addresses the additional issue of whether to continue a temporary confidentiality order.

A. Credibility

Dr. Hart initially was called as an adverse witness in General Counsel's case and a direct witness in Respondent's case. He initially denied that he edited any of the management

statements; he then was contradicted by documentary evidence. (Tr. 21; GC Exh. 29.) He later denied that he said that he would consider an employee's failure to make a part out of the correct material a "catastrophic error," then shifted when confronted with a prior sworn statement. (Tr. 24-25.) Hart attempted to avoid an admission that his June 8, 2018 meeting notes with Stroup was about alleged increased employee discipline, which was contained on the first page of Hart's meeting notes. (Tr. 29; GC Exh. 17, p. 1.) Hart also tried to avoid answering that Respondent's evidence of disparate treatment failed to demonstrate anything other than purposeful conduct. (Tr. 428.) Therefore, I do not credit much of Hart's testimony.

Hamra first testified as an adverse witness in General Counsel's case. He was business-like but hedged on certain questions, which General Counsel remedied by referring him to his affidavit. When called a few hours later in Respondent's case-in-chief, Hamra developed a high-pitched giggle that was not present during previous testimony, which I suspect was due to nervousness that developed between the periods of testimony.

Regarding the management meeting on March 29, Hamra had no recollection of telling the managers that he already determined the 77 parts could be reworked. He tried to avoid General Counsel's questions about why, as the engineer, managers overrode his assessment about the parts being reworked. (Tr. 289-290.) He admitted he never had been included in this type of meeting before Stroup's error. (Tr. 292.) Amend agreed that Hamra was not asked about the parts in the March meeting. Although Hamra attempted to avoid a number of questions, I partially credit his testimony regarding never having any manager outside the Engineering Department override his determinations before these events and that the 77 parts without disks were curable. I discredit his later explanation of why the IRR was changed, particularly since he testified inconsistently when the determination was made.

Respondent's witnesses also were externally inconsistent about why the 77 parts without disks were not reworked. Roberts, the most definite and convincing, stated the reason was due to either potential union or unfair labor practice action. Amend waffled on whether he saw the original IRR recommending reworking the 77 parts, saying "Could be, I don't know." (Tr. 338.) When asked whether the parts were reworkable, Amend testified that Stroup's error was of a great magnitude and they did not know what "we didn't know" and that the parts possibly could have been reworked but for the extensive investigation. (Tr. 337.) I discredit Sook's initial denial that she had any knowledge of whether the 77 parts were returned to Stroup for rework and said that would have been up to his supervisor; however, given the status of her March 22 notes on the IRR and later admission, she certainly gave her imprimatur to reworking parts. Sook was also inconsistent with Stroup's supervisor, who requested whether the parts could be reworked. (Tr. 275; GC Exh. 15, p. 4.)

As a result, I must find that the parts were reworkable for a number of reasons: Hamra and Sook initially agreed that most of the parts were reworkable; Hamra, in his engineering expertise, stated his initial assessment was not incorrect; Amend testified that the parts were retained because "We don't know what additional questions or investigative processes or question that you may have. . . .";³⁰ and Roberts admitted that the parts were held due to potential grievances or unfair labor practice charges. An additional reason arises with the changes to the IRR on April 12.

³⁰ See Tr. 354. Amend testified generally that other occasions occurred where Respondent retained parts.

Respondent's witnesses were externally inconsistent when it came to who determined to change the IRR on April 12. When asked whether engineering changed its mind about the status of the parts, Sook testified, with some hesitation, that the initial decision was just engineering and quality, but:

[T]here was another decision based off of management to actually revise that disposition. That's the reason why there's a later date, April 12th, with the disposition being changed because management had another decision on how - - we were not going to rework those parts after all for this customer.

... The decision that was made later was not just engineering. It was production, so management in production, engineering, and quality as well. The whole team actually had a disposition at the end to change that.

(Tr. 277.) Amend denied that he or Roberts were involved with changing the IRR. (Tr. 334.) However, Hamra testified that his initial determination was not incorrect.

Because of these inconsistencies I discredit Respondent's witnesses saying that this error was "very severe." (See, e.g., Roberts, Tr. 402.)

Respondent's witnesses also could not agree on when the "formal investigation" started. Amend stated it began March 19; Roberts and Hart said 10 days later, when the managers met face to face. Further, Respondent's managers could not agree on who made the determination to terminate Stroup in their April 8 teleconference.

Although Respondent's witnesses maintained the investigation was "formal," Respondent kept no notes of the March 29 or April 8 meetings, with perhaps the exception of Sook's entry of the March 29 meeting. Sook's notes, stating that she questioned whether "personnel" making this error should continue to work there, also are inconsistent with Hart's testimony stating that no level of discipline was discussed on March 29. Based upon Sook's documentation here and Hart's recommendations on April 5 to Hamra to amend his statement in preparation for possible legal action, Respondent had not only discussed the discipline but also anticipated terminating Stroup's employment as early as March 29. (GC Exh. 27.)

Stroup never denied he made errors. (e.g., GC Exh. 27, p. 4.) He testified consistently that he may have been interrupted while making the parts, despite Respondent's efforts to discredit his testimony. The possibility of interruption is also consistent with some of Hamra's assessment. He also admitted making the error on 510 parts, for which he received no discipline. With one exception, he was not hostile during cross-examination and answered the questions to the best of his knowledge. His testimony is credited in full.

Farris's testimony had some slight differences, such as the percentage of IRRs written and who attended the termination meeting. These minor differences might be expected and do not affect the credibility of most of his testimony.

B. Applicable Law: Wright Line analysis for Section 8(a)(3) and (4)

1. Section 8(a)(3) mixed motive case

Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discipline and discharge is alleged, General Counsel has the burden to prove that the disciplinary action or discharge was motivated by employer antiunion animus.

In determining whether adverse employment actions are attributable to unlawful discrimination in mixed motive cases, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 108 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Fremont-Rideout Health Group*, 357 NLRB 1899, 1902 (2011); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 67 (2d Cir. 2009).

The burden shift to the employer to demonstrate that the employee would have been discharged regardless of protected activities. *Miera v. NLRB*, 982 F.2d 441, 446 (10th Cir. 1992). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 *fn.* 12 (1996); *T & J Trucking Co.*, 316 NLRB 771 (1995).

2. Section 8(a)(4) mixed motive case

The Board recently reiterated the importance of Section 8(a)(4) and employee access to Board processes:

Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges. See, e.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). The Board has no power to issue complaints *sua sponte*; Section 10(b) of the Act empowers the Board to do so "[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice . . ." (emphasis added). Accordingly, the Supreme Court has recognized that "[i]mplementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings. *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972). This is shown

by Congress's adoption of Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or otherwise discriminate against employees for filing charges or giving testimony under the Act. *Id.* at 121-122; see also *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) (“The policy of keeping people ‘completely free from coercion’ [] against making complaints to the Board is . . . important in the functioning of the Act as an organic whole.”) (quoting *Nash v. Florida Industrial Commission*, 389 U.S. at 238).

Prime Healthcare Paradise Valley, LLC, 368 NLRB No. 10, slip op. at 4-5 (2019).

The Supreme Court found that Section 8(a)(4) should be interpreted broadly due to employee protection granted by the Act, its legislative history, remedial goals and subpoena authority. *NLRB v. Scrivener*, 405 U.S. 117, 121-125 (1972). If employees are subpoenaed, even if not called to testify, they are considered protected under Section 8(a)(4). *Id.* at 124-125; *Williamhouse of Calif., Inc.*, 317 NLRB 699, 715 (1995). In *Quality Millwork Corp.*, 276 NLRB 591, 596 (1985), an employer violated Section 8(a)(4) when it terminated its employee 3 days after the employer advised the employee it did not have to respond to a Board subpoena, and then saw the employee at the Board’s office.

Similar to the analysis in examining a possible 8(a)(3) violation, the analysis in 8(a)(4) also follows the *Wright Line* framework. General Counsel initially must establish that Respondent took adverse action, at least in part, due to the alleged discriminatee’s participation in protected Board activities, such as filing charges, participating in investigations, and providing testimony. General Counsel must show that the employee engaged in such protected activities, the employer had knowledge of such activities, and the activity was a motivating factor in Respondent’s adverse action. *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 561 (6th Cir. 2019), *enfg.* 366 NLRB No. 104 (2018). If the General Counsel makes this showing, the burden shifts to the Respondent, which must show by a preponderance of evidence it would have taken the same action even without the protected activity. *Airgas USA*, 916 F.3d at 561.

C. Parties’ Positions

1. General Counsel

General Counsel contends that Stroup, as Local 4992 president, had many contacts with Respondent’s managers about daily employee relations and contractual issues. He also was active in the 2018 union activities. He was disciplined in 2018, along with two other bargaining unit members. This and other events in 2018 demonstrate animus towards the union. These events led to the Board issuing complaint against Respondent.

Stroup attended the October 2018 unfair labor practice hearing. He did not testify because the judge ordered the parties to reach a settlement. He was part of the Union’s team in negotiating the informal Board settlement. After the settlement he worked to enforce it with contacts to Dr. Hart and others on the management team. He continued these efforts until he

was suspended in April 2019. These efforts demonstrate that Stroup was involved in activity protected by Section 8(a)(4).

Respondent had not terminated any employee who made production errors that were similar or worse than Stroup's error. Respondent's examples of terminations were for purposeful conduct. Respondent also did not demonstrate how failing to rework the parts or Stroup's error did not meet its quality standards. The evidence demonstrates pretext and Respondent did not meet its burden of proof for either 8(a)(3) or (4).

2. Respondent's position

Respondent contends timing does not demonstrate any anti-union animus at the time of Stroup's discharge and union activity was low at the time of the discharge. (R.Br. 18-20.) It further argues that the evidence is more of "flimsy speculation" and "Charging Party is attempting to create a per se rule that union presidents cannot be terminated regardless of their job performance." (R.Br. 20-21.) Ultimately, Respondent contends that Stroup would have been terminated regardless of union activities and animus because Stroup's error was significantly more severe than most others and it "consistently terminated the employment of employees who commit workplace errors that are more severe than common production errors." (R.Br. 22.) Respondent's brief does not address the 8(a)(4) allegation.

D. Discussion

1. Union and Board activities and Respondent knowledge

All managers and Hamra admitted they knew Stroup was union president. However, it denies that Stroup engaged in any activities close in time to the termination in 2019 because grievance activity was lower than in previous months.

Grievance activity is not the only sort of union activities. Stroup communicated about the open vacation issue, which also was at issue after the Board settlement. Stroup engaged in Board activities, including attempting to enforce the Board settlement and none of the managers, including Hart, denied receiving Stroup's emails on the vacation issue, which was a contractual issue as well as related to the Board settlement.

Stroup engaged in activities protected by Section 8(a)(4) of the Act and Respondent knew of these activities. He was a named discriminatee in the prior Consolidated Complaint that Respondent defended. Stroup was subpoenaed as a witness for that hearing and although not called as a witness, Respondent knew that he was subpoenaed and saw him at the hearing location. *Scrivener*, 405 U.S. at 124-125; *Quality Millwork*, supra. After the Consolidated Complaint settled in an informal Board settlement, Stroup communicated with Respondent, particularly Hart, about enforcement of the settlement. Because the Act protects its remedial goals protects the remedial goals of the Act, Stroup's discussions about enforcement of the settlement are protected. *Scrivener*, supra.

2. Animus

Proof of animus and discriminatory motivation is fact-based and may be based on direct evidence or inferred from circumstantial evidence. *SCA Tissue North America LLC*, 371 F.3d 983, 988-989 (7th Cir. 2004), enfg. 338 NLRB 1130 (2003); *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). A showing of animus need not be specific towards an employee's union or protected concerted activities. *Colonial Parking*, 363 NLRB No. 90, slip op. at 1, fn. 3 (2016).

Because direct evidence of unlawful motivation is seldom available, General Counsel may rely upon circumstantial evidence to meet the burden. Circumstantial evidence is used frequently to establish knowledge and animus because an employer is unlikely to acknowledge improper motives in discipline and termination. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984). Also see *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Factors that may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. *Purolator*, 764 F.2d at 1429; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995), denying rev. 311 NLRB 1118 (1993).

a. Timing

Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002) (timing of discipline imposed 4 months after service on bargaining team and ULP hearing appearance suspect).

Respondent argues that Stroup did not have any protected union activities after summer 2018, so that timing is insufficient for an inference of animus. Respondent also contends that no animus existed because Stroup made an error in January 2019, closer in time to the picketing and other significant union activities. Respondent also argues that no grievances were filed in late 2018 until Stroup was terminated.

Respondent ignores much of Stroup's efforts on behalf of the Union and in support of the Board settlement, as described in the above section. As these activities are both union activities and in support of the Board settlement, the timing indicates that Stroup was heavily involved up to the day of his suspension. This timing supports a finding of animus under Section 8(a)(3) and (4). See generally *The Sheraton Anchorage*, 363 NLRB No. 6 (2015).

b. Pretext

Pretext can take many forms. Here, I examine shifting reasons, the investigation techniques, and disparate treatment.

(1) Shifting reasons

Shifting explanations for Respondent's disciplinary actions constitute strong evidence that Respondent's asserted reasons are pretextual. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 274 (2014); *Kingman Regional Medical Center*, 363 NLRB No. 145 (2016) (respondent's shifting defenses implies grasping for reasons to justify unlawful conduct) (cite omitted); *Scientific Ecology Group, Inc.*, 317 NLRB 1259, 1259 (1995). Also see *NLRB v. Aquatech, Inc.*, 926 F.2d 538, 547 (6th Cir. 1991), enfg. 297 NLRB 711 (1990) (inconsistencies in proffered reason and employer's actions lead to inference of antiunion animus). Respondent's failure to claim "an asserted reason for adverse action at the time the action is taken can indicate a discriminatory motive." *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983).

One large shift was documentation in the IRR: On March 22 Sook and Hamra agreed that the 77 parts without disks were fixable; on April 12, post-discharge, they changed the IRR to state that 77 parts and others were not fixable at all. This shift flies in the face of Hamra's testimony that his initial assessment on the IRR was not incorrect. Hamra also found that Stroup's actions were not done purposefully and were "fixable," yet Dr. Hart instructed him to remove this assessment from his report on April 5.

Respondent claims leaving out the disks was unprecedented and such a severe error that it instead "decided not to rework the parts so as to not further delay shipment of the order and to preserve the parts for investigatory purposes." (R. Br. 5.) Roberts however, testified that the order was not due as other parts were necessary for the shipment. Additionally, Respondent's need to "preserve the parts for investigatory purposes" relate not whether the parts were reworkable or needed to be scrapped but to Respondent's defensive moves toward union or Board activities. Respondent never showed what other investigation was necessary for the parts either. I find these shifts significant and demonstrate animus towards Stroup's union and Board activities.

(2) Using different investigation techniques than normal and lack of a meaningful investigation

Despite Respondent's investigation, which used different methods than normal, Respondent did not conduct a meaningful investigation. I first examine the methods of the investigation, then the lack of a meaningful investigation.

First, using different methods of investigation than usual supports a finding of pretext and discriminatory intent. *Allstate Power Vac, Inc.*, 357 NLRB 344, 347 (2011) (e.g., higher level of corporate structure than usual). Hart admittedly never participated in investigation or discipline for these types of errors before Stroup; he later changed his testimony that he had to approve

disciplinary action. Here, he apparently coordinated the investigation, beginning on March 29, and subsequently told Hamra how to document his findings. Hart's role was beyond approving discipline. Hamra had not been involved in such proceedings before the investigation on Stroup, nor had any manager outside the Engineering department changed his findings.

Secondly, Respondent's failure to conduct a meaningful investigation and give the alleged discriminatee an opportunity to explain are "clear" indicators of discriminatory intent. *New Orleans Cold Storage & Warehouse Co., Ltd.*, 326 NLRB 1471,1477 (1998), enf'd. 201 F.3d 592 (5th Cir. 2000). Also see: *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124 (2018); *Rainbow Medical Transportation, LLC*, 365 NLRB No. 80 (2017), citing *Andronaco*, 364 NLRB No. 142, slip op. at 14 (2016) and cites therein. Also see *Airgas USA, LLC*, 916 F.3d at 563 (8(a)(4) violation).

A number of instances demonstrate that Respondent's investigation was "unwilling[] to get at the truth" and instead demonstrate an effort to "provide it with some cover in the event the discharges were subsequently challenged." *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 500 (2007). First, the investigation failed to ask other employees about the error. Second and more significantly, the managers failed to ask salient facts about the parts, particularly the 77 parts that could have been reworked. In the March 29 meeting, no one asked Hamra and Hamra apparently did not offer that the parts could be reworked; even without Hamra present, that aspect of investigation was ignored. Sook was in the meeting and already had approved reworking, but did not raise that possibility either. When Hart reviewed Hamra's statement on April 5, Hart purposely ignored salient facts of Hamra's investigation that exculpated Stroup, such as reworkability of the parts and that Stroup did not make the error on purpose. Indeed, Hart's comments to Hamra show he intended to give "cover" to the investigation. Sook's report of the investigation also omits facts, such as her granting permission to the supervisor for Stroup to fix the parts. (GC Exh. 27, pages 8-9.)

Respondent also refused to examine other similar cases when presented during the suspension and termination meetings. In the suspension meeting, Farris brought 5 similar IRRs, which Respondent ignored. Similarly, in the discharge meeting, Hart refused to hear anything Stroup said about a case in which an employee received only a verbal warning for an error Hart categorized as "catastrophic." Stashing the parts in quarantine in case of union and/or unfair labor practice proceedings and belatedly changing the IRR post-termination also demonstrate Respondent sought "cover." These factors demonstrate that Respondent intended to terminate Stroup, regardless of what the investigation showed. These instances show, not only was Respondent unwilling to reach the truth, but tried to mold the situation to cover its true motives. *Inter-Disciplinary Advantage*, supra.

Not only did Hart purposefully ignore the chief engineer's assessment of the parts, Respondent also stashed the parts without the disks and did not correct it. As noted above, a number of Respondent's witnesses gave vague answers about why the parts were not fixed. The true reason, as stated by Roberts, was because of possible grievances and unfair labor practice proceedings and not any delays in meeting customer expectations. Respondent therefore failed to conduct the investigation as usual and the investigation that it did undertake was designed to avoid the truth---together, another strong indicator of animus.

(3) Disparate treatment and deviation from past practice

Pretext may be established when an employer does not discharge employees who committed similar offenses. *Charter Communications, Inc. v. NLRB*, ___ F.3d ___, 2019 WL 466054 (6th Cir. September 25, 2019),³¹ enfg. 366 NLRB No. 46 (2018). The most striking evidence is that Respondent's examples of terminations were those terminated for purposeful conduct, compared to Respondent acknowledging that Stroup did not purposefully make these errors. Three of the discharges were for admittedly purposeful activity and two were failing drug and alcohol tests. These discharges do not demonstrate that Respondent treated Stroup the same as other terminations. *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at *14 (2018). Respondent could not reasonably believe that Stroup's actions, which were correctable in less than a day, would be similar to the purposeful acts for which it discharged employees, or failed to take any disciplinary action against an employee who deliberately "stomped" on parts he was assigned to rework.

Hart's letter describes Stroup's error as a 25% failure rate. Amend, in the early review, described the failure rate at 15%. Yet Putnam's error was a 100% failure rate, requiring the entire order to be reworked. In describing Putnam's error, and Roberts described it as "serious" and Hart as "catastrophic." Yet, compared to Stroup, Putnam received only a verbal warning.

Similarly, anecdotal evidence provided by General Counsel's witnesses show correctable errors worse than Stroup's, with the employee permitted to rework the parts. Not only does this demonstrate disparate treatment, it also demonstrates a deviation from Respondent's practices. I find that, but for Stroup's work on behalf of the Union, Local 4992 and the Board settlement, Respondent would have permitted Stroup to correct his errors.

c. Other evidence of animus

The evidence of the 2018 union activities here is not used to prove a time-barred unfair labor practice but instead provides information about the "true character" of events within the time period now at issue. *Machinists Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960); *REM Transportation Services, LLC, d/b/a Ambrose Auto & Autotrans Katayenko*, 361 NLRB 931 fn. 2 (2014) (evidence from settled case may be background evidence in determining motive before or after settlement). This information is not the only basis for making this determination and therefore is permissible. *Id.* at 417-418. I find that the activities described in the prior case provide additional evidence of animus towards union activity. See generally *Ambrose Auto*, 361 NLRB at 936.³²

³¹ The court cites: *United Nurses Ass'ns of Cal. v. NLRB*, 871 F.3d 767, 781 (9th Cir. 2017); *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 223 (D.C. Cir. 2016); and *Bates Paving*, 364 NLRB No. 46 (2016).

³² Even if I did not rely upon the evidence that led to the 2018 Board complaint, General Counsel still presents a strong prima facie case.

At hearing, Respondent contended that in 2018, the Union filed a number of unfair labor practice charges for the purpose of harassment. However, other than the number of charges filed, Respondent did not prove the Union or Local 4992 was engaged in harassment.

5 d. Conclusion on animus

Timing, shifting reasons, pretext and other reasons strongly establish that Respondent's reasons for terminating Stroup are false and "justifies an inference that its real motive for a discharge was unlawful." *L.S.F. Transportation, Inc. v. NLRB*, 282 F.3d 972, 984 (7th Cir. 2002),
 10 enfg. 330 NLRB 1054 (2000); *Coil-A.C.C., Inc. v. NLRB*, 712 F.2d 1074 (6th Cir. 1983), enfg. 262 NLRB 76 (1982). General Counsel establishes a prima facie case that Respondent terminated Stroup in violation of Section 8(a)(3) and (4).

15 3. Burden shifts to Respondent

Respondent is required to show it would have taken the same action for legitimate reasons even in the absence of the protected activity. *Monroe Mfg.*, 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. mem. 86 F.3d 1146 (1st Cir. 1996). If a respondent's stated motives "are found to be false, the circumstances may warrant an inference
 20 that the true motive is an unlawful one that the respondent desires to conceal." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

"... [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful
 25 motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). A number of factors demonstrate Respondent's defenses are pretextual, and Respondent therefore failed to meet its responsive burden.

Much of the evidence of pretext is discussed above in animus and I rely upon those same
 30 reasons here. Respondent argues that Stroup's error, of failing to install the valve, was unique, "[s]uch a glaring and obvious defect." Respondent relies upon 3 comparators who purposely did not build parts correctly. These include sabotage. In an uncontroverted example from General Counsel, one employee purposefully "stomped on" parts that needed to be repaired, were
 35 reported to management by other employees, and the employee apparently was not disciplined, much less terminated. Two other Respondent comparators were terminations for positive drug and alcohol tests, which are not specifically related to building parts. Respondent was not consistent in its disciplinary actions, which lead to the conclusion that the reasons for termination are pretextual. The additional reasons for pretext, as discussed above with animus, also
 40 demonstrate that Respondent's reasons were false, which leaves me with a finding that Respondent indeed terminated Stroup due to unlawful motives.

4. Conclusion on alleged 8(a)(3) and (4) Violations

As General Counsel presents a strong prima facie case and Respondent did not meet its
 45 burden, I find that Respondent violated Section 8(a)(3), (4) and (1) by terminating Stroup. Based

upon all the evidence, particularly upon the cover-up of Hamra's initial assessment that the parts could be reworked, the pretexts as discussed above, and the disparate treatment evidence, the record leads to the conclusion that Respondent terminated Stroup due to not only his union activities, but also because of his Board activities. *Prototype Plastics*, 294 NLRB 711, 715-716 (1987).

E. Confidentiality of Records

Both General Counsel and the Union subpoenaed documents for hearing. Throughout the pre-hearing proceedings, Respondent requested a confidentiality order for documents that it maintained were restricted due to national security and its contractual obligations. Respondent was particularly sensitive to release of errors, customer names, and other items that it identifies as trade secrets. However, Respondent also admitted that not all of its customers were involved in national security. On August 14, 2019, I issued a temporary confidentiality order for the documents General Counsel and the Union received pursuant to subpoenas duces tecum, particularly those that Respondent maintained were subject to national security concerns. I ordered that Respondent produce to General Counsel a log for privileges and confidentiality. The last feature of the Order stated:

5. The Temporary Confidentiality Order will dissolve when the administrative law judge's decision issues. In post-hearing briefs, the parties will argue whether the Order should be made permanent and to which information the Order should apply.

Respondent produced documents to General Counsel and the Union and claimed it submitted all documents. General Counsel had in its possession, prior to receiving the documents, the documents Respondent submitted to OESC, which Respondent claimed should have been protected but were not. Additionally, GC Exh. 28, to which Respondent stipulated, provided a table of errors and avoided inclusion of IRRs into the record. Throughout the hearing, except for GC Exh. 27, which were the documents from OESC, the parties were careful to redact the name of Respondent's customers and the transcript reflects the same.

At hearing, I repeatedly reminded the parties to brief issues of confidentiality of documents. General Counsel did so; the Union adopted the General Counsel's brief; and, Respondent failed to address the issue at all in its post-hearing brief.

Administrative law judges have authority to issue protective orders. *Teamsters Local 917 (Peerless Importers)*, 345 NLRB 1010, 1011 n. 7 (2005), citing *AT&T Corp.*, 337 NLRB 689, 693 n. 1 (2002); *United Parcel Service*, 304 NLRB 693 (1991); *National Football League*, 309 NLRB 78, 88 (1992). Respondent, as the party seeking a protective order, bears the burden of demonstrating "good cause" under Fed. R. Civ. Pro. 26(c) "or when a disclosure would clearly defined and serious harm." *Impremedia*, Case 29-CA-131066, unpub. Board order issued Jan. 14, 2015 (2015 WL 193732). Respondent must show particular and specific demonstration of fact, as opposed to a mere conclusory or speculative claim of harm. *Waterbed World*, 289 NLRB 808, 809 (1998) (denying respondent's motion of a protective order in part because of "scanty and conclusory nature of respondent's averments").

To the extent that Respondent seeks to keep confidential customer names, trade secrets and business information, General Counsel is bound by the Freedom of Information Act (FOIA). Under FOIA, the agency is required to promptly disclose records unless the agency can demonstrate that one or more exemption applies. *U.S. Dept. of State v. Ray*, 502 U.S. 164, 173, (1991). The agency must explain reasons for non-disclosure of documents and cannot rely upon its administrative protective order designating a record confidential. *General Elec. Co. v. NRC*, 750 F.2d 1394, 1400 (7th Cir. 1984). FOIA's Exemption 4 encompasses trade secrets and commercial or financial information that are privileged and confidential. 5 U.S.C. 552(b)(4).

Regarding confidentiality of other documents, such as those provided in response to the Union's subpoena, Respondent's post-hearing brief disregarded the August 14, 2019 Order: Respondent did not address whether the confidentiality order should be made permanent, much less identify which information should be kept confidential. As a result, I must conclude that Respondent waived its arguments, much less made a showing of "good cause." The Temporary Confidentiality Order is hereby dissolved.

CONCLUSIONS OF LAW

1. BS&B Safety Systems, LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The following are Respondent's supervisors within the meaning of Section 2(13) and/or agents within the meaning of Section 2(11) of the Act:

a. Dr. Charles Hart	Corporate Director, HR, EH-S and NAFTA
b. Tim Jones	Supervisor
c. Allan Roberts	Production Manager
d. Dennis Amend	Operations Manager
e. Lori Sook	Quality Control Manager
3. Danny Hamra is an agent of Respondent within the meaning of Section 2(11) of the Act.
4. Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC (the Union) and its Local, Local 4992, are labor organizations within the meaning of Section 2(5).
5. On April 9, 2019, Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Michael Stroup for union and other protected activities.
6. On April 9, 2019, Respondent violated Section 8(a)(4) and (1) of the Act when it discharged Michael Stroup for cooperating and assisting the Board in its proceedings, including settlement proceedings.
7. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent Liberty violated Section 8(a)(4), (3), and/or (1) by discharging Michael Stroup, Respondent is ordered to make Stroup whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Stroup for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, we shall order the Respondent to compensate the named employees for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 14 allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Respondent shall also be required to remove from its files any reference to the unlawful discharge and to notify Stroup in writing that this has been done and that the unlawful discharges will not be used against them in any way.

The Union requests an additional remedy: Requiring either Dennis Amend or Dr. Hart, or a representative of the Board while a management representative is present, to read the notice to employees. The Union argues that this remedy is necessary due to Respondent's pervasive violations of the Act, including those from the previous complaint for which testimony was elicited to support animus. Because I do not make findings regarding the 2018 unfair labor practices, reading the notice is not warranted.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

1. Cease and desist from
 - a. Discharging employees because they engaged in union and/or other protected concerted activities.
 - b. Discharging employees because they gave assistance, testimony
 - c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - a. Make Michael Stroup whole for any loss of earning and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.
 - b. Compensate Michael Stroup for his search-for-work and interim employment expenses, plus interest, regardless of whether those expenses exceed interim earnings.

- c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Michael Stroup, and within 3 days thereafter, notify him in writing that this has been done and the discharge will not be used against him in any way.
- d. Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- e. Within 14 days after service by the Region, post at its Tulsa, Oklahoma facility copies of the attached notice marked "Appendix."³³ The notice shall be posted in English and any other language deemed necessary by the Regional Director. Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed its Tulsa, Oklahoma facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 1, 2019.³⁴
- f. Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has been taken to comply.

Dated Washington, DC, October 21, 2019



Sharon Levinson Steckler
Administrative Law Judge

³³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³⁴ I select April 1 as the day on which Stroup was suspended.

Appendix

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because you engaged in union and/or other protected concerted activities.

WE WILL NOT discharge you because you assisted in a Board investigation or testified in a Board hearing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Michael Stroup full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Michael Stroup whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest and

WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Michael Stroup for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Michael Stroup, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

BS&B SAFETY SYSTEMS, L.L.C.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

1222 Spruce Street, Room 8.302, St. Louis, MO 63103-2829
(314) 539-7770, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/14-CA-239530 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE
OFFICER (314) 449-7493